REPORT

RELATIVE TO

EXECUTIVE PATRONAGE,

READ IN SENATE,

MARCH 25, 1822.

Mr. HILL, Chairman

all the constitutional provisions which in any way relate to executive patronage: and also of the several acts of the legislature, which have been passed at different times for the purpose of explaining, extending or increasing the same. All of which constitutional provisions and acts of the legislature shall be duly noticed in their proper places.

The 9th section of the 2nd chapter of the constitution of 1776, vests in the general assembly the "power to choose their speaker, the treasurer of the state and their other officers." The 20th section of the same chapter, provides that "the president and in his absence, the vice-president with the council, five of whom shall be a quorum, shall have power to appoint and commissionate judges, naval officers, judges of the admiralty, attorney-general, and all other officers, civil and military; except such as are chosen by the general assembly or the people," under the broad and indefinite expression contained in the 9th section above quoted, 'their other officers." And the very indefinite exception from the executive appointments, in favor of the general assembly, contained in the 20th section, viz. "except such as are chosen by the general assembly or the people." The general assembly, did for some years claim and exercise not only the power of creating offices, but also the prerogative of appointing the officers; except those appointments specially given to the supreme executive council

The extensiveness of the appointing power thus exercised by the general assembly, was much complained of by the members of the executive council. But the general assembly notwithstanding those complaints continued to create offices, and to appoint officers in such manner, and at such times as in their own opinion was best calculated to promote the public weal, until the meeting of the council of censors in 1783. That council of censors among other things, recommended to the general assembly, the passage of a law dividing the appointments thereafter to be made, between the supreme executive council and the general assembly, pursuant to which recommendation, the general assembly did, on the fourth day of April, one thousand seven hundred and eighty-five, pass an act, prescribing the appointments to be made by the general assembly, and vesting in the executive council the appointment of all other officers, whose appointments were not otherwise provided for by the constitution. But it must be borne in mind that this law is only an act of the general assembly, and like all other legislative acts, is liable to legislative alteration, revision or annihilation, at any time, when a succeeding legislature, from different views of the constitution, from different notions of public policy, or from different ideas of the wishes of the people, shall deem it to be necessary and proper so to do.

The committee have had among other documents referred to them, a letter from the secretary of the commonwealth, containing much information on the subject of executive patronage, this letter attached to this report, marked A, is an answer to a call made upon that officer, at the last session of the legislature, by a committee appointed for the purpose of ascertaining the governor's powers to appoint officers, and the different channels through which those powers have been obtained. This intelligent, venerable and candid statesman, relies on the eighth section of the second article of the constitution of 1790, the law above referred to, several acts of assembly of subsequent date, and on common law principles, to justify the governor in the extent of patronage, which he at present exercises. So far as the governors powers are vested by the constitution, they must remain unimpaired.

But we presume, that however long the governor may have exercised the power of appointing to office, by virtue of any statute, or common law principle, that the powers thus claimed and exercised can at any time be reclaimed by the legislature, and otherwise disposed of, whenever they shall deem a change necessary and expedient. Official powers vested in any officer by the legislature, may, when the public good requires it, be also divested by the legislature.

The peculiar business of legislation, is to pass laws for the regulation and guidance of all who are concerned in the administration of the government, and the benefit of the people Common law is an auxiliary to statute law, and is only to be called upon in cases not particularly provided for by the statute. Those official powers, which are vested by act of the legislature and common law principles only, are not constitutional powers, and therefore fit objects of legislation.

We now proceed to the examination of the only constitutional provision relied on by the advocates of executive patronage, it is contained in the 8th section of the 2nd article of the constitution of 1790. By this article the governor is authorised to "appoint all officers whose offices are established by this constitution, or shall be established by law, and whose appointments are not herein otherwise provided for." Preparatory to the construction of this provision of the constitution, it may not be improper to take a review of long established and well settled principles of construction in all cases relative to vested rights. In every case where individual rights are legally and absolutely vested, they are supposed to remain secure and unimpaired, until it can be clearly and conclusively shown, that those rights have been expressly transferred. While your committee entirely approbate the cautionary and scrupulous manner in which a transfer of individual rights is examined and

decided upon, they earnestly, though respectfully, recommend to the legislature, in construing the powers delegated by the constitution; at least to use as great caution and strictness in favor of the rights of the great body of the people. It is not only acknowledged by all republican politicians, but it is also positively declared by the constitution, "that all power is inherent in the people." It is therefore incumbent on every officer of the government, and agent of the people, who claim to have been invested by the constitution with the exercise of any power, to show that such power has been expressly vested in him by the constitution; if he fail to do this, it would be great remissness in the legislature, (who are the immediate agents and representatives of the people,) to indulge him, contrary to the public interest, in the exercise of a doubtful power. History affords us abundant proof, that the great danger to be apprehended, as well in republican governments as all others, is the engrossment of power by a few, and its exercise by them, to the injury of the many. Usurpation is the very marrow, the bone and the sinew of despotism—assumption freely indulged in by an individual, and quietly acquiesced in by the people, will in time bring upon the community, all the poisonous effects of usurpation in its most terrific form. But to return to the words of the constitution of 1790, which are relied on by the friends of executive patronage, as justifying the executive in the extent of the appointing power, which he has been in the exercise of: "He shall appoint all officers whose offices are established by this constitution, or shall be established by law."

Is it reasonable to suppose, that the convention in speaking of the offices established by this constitution, had reference to offices which had long before been established, and the incumbents whereof, had long been aiding in the labors of the government; the correctness of such a construction, when viewed in connection with all the circumstances which are connected with this provision of the constitution, might well be doubted. The isolated word ESTABLISH is significant of, *found, erect and confirm*; as well as, *to, settle and fix firmly* that which has been founded and erected It would appear that the former of these two constructions, is the sense in which the convention had used the word *establish* in the constitution, because it is used in connection with "shall be," evidently referring to offices that might "be established by law" subsequently to the confirmation of the constitution, and had beyond question in view the appointment of officers to fill offices thereafter to be created and confirmed. But your committee in drawing their conclusions of the sense in which the convention used the word "establish" do not rely wholly, nor indeed so much upon the definition it bears, even as used in connection with the words "shall be," as they do upon other important facts which have a direct bearing upon the construction given to this provision of the constitution, by the friends of executive patronage.

It appears by a full examination of the constitution of 1790, and of several acts of the legislature, passed immediately thereafter, that the convention have expressly vested such power of appointment in the executive, as it was intended he should absolutely exercise; and also have expressly vested in the general assembly, such appointing power as was designed to be absolutely exercised by that body, leaving the appointment of officers not specially provided for, to be regulated (as had before been done,) by act of the legislature. Constitution Art. 5, Sec. 4, "he *shall* appoint in each county not fewer than three, nor more than four judges &c."—Same Art. Sec. 10, "The governor *shall* appoint a competent number of justices of the peace," &c. Art. 6, Sec. 5, "The state treasurer *shall* be appointed annually by the joint vote of the members of both houses," &c. In those cases the convention left nothing to the discretion of the legislature, nor even to the people, during the continuance of the constitution, however great the progress of information and political knowledge might be among the citizens in future times. But your committee trust, that they will be able to convince every candid, intelligent, unbiassed mind, that all appointments, not *specially* provided for in the constitution, was intended by the convention to be left to the future regulation law. The constitution was done in convention, the second day of September, one thousand seven hundred and ninety; and on the seventh day of December next following, the general assembly convened pursuant to the provisions of said constitution. In this legislature, there were fourteen members, who had been members of the convention; combining as much general information, as much political knowledge, and as great a quantum of integrity, as we ever have seen, or ever expect to see our general assembly adorned with, in an equal number of members.

This opinion will be responded by all who are acquainted with the public characters and private virtues of those gentlemen—their names we insert in the following alphabetical order, viz. James Boyd, John Breckbill, Lindsey Coates, William Findley, Albert Gallatin, John Gloninger, Sabastian Graff, Joseph Hiester, John Hoge, Thomas Jenks, James M'Lene, Thomas Mawhorter, John Sellers, John Smiley. The above facts are stated, and the names of those gentlemen are introduced for the purpose of showing what their opinion was respecting the powers that had been vested in the governor, by the constitution, as near as can be judged of by the enactment of various laws while they were members of the legislature; and the significant language made use of in those laws. It will be proper however, before we proceed to an examination of those laws, to state that Thomas Mifflin, (the president of the convention) was declared to be duly elected governor of this commonwealth, on the 18th day of December 1790. That on the twenty-eighth day of the same month he addressed a mes-

sage to the legislature, inviting the attention of the members to certain important duties, requiring their immediate attention under the new structure of the government.

In detailing at considerable length, the objects of most pressing necessity, the governor observes, (Journal of the House of Representatives of that session, page 46,) "as to the laws, which require an immediate revision, on account of the new structure of our state government, you will find that they principally relate to the exercise of the executive authority under its former modification." After specifying many official duties that were to be performed by the executive authority, under the former modification of the government; the message remarks, "In short, to the president and executive council, so great a variety of appeals and reports were directed to be made—*by them so great a variety of commissioners and other officers were to be appointed for specific services*—before them, so great a variety of official qualifications and sureties were to be taken—and on them the superintendance of so great a variety of public objects devolved, that a particular recapitulation would, at this time be impracticable." It will be observed, by an examination of the above extracts from governor Mifflin's message, that he in a particular manner notices the great power of appointing officers that had been vested in the executive authority, under the former structure of government, to regulate the exercise of which power thereafter, legislative interposition was immediately necessary; consequently, in the opinion of the governor, the power of appointing many of the officers which had been vested in the executive authority under the former structure of government, had not been provided for by the constitution; and were purposely left to the future regulation of law, in such manner as propriety and experience should dictate.

Your committee are fully apprized, that some of our state politicians are disposed to give the most liberal and extensive construction to delegated powers, that the words of the constitution will possibly bear; while they construe in the most scrupulous and limited manner, those powers which are reserved by the people, or (which is the same thing,) the powers that they have not delegated. The anxiety with which some people labour in this cause, is much easier seen, than accounted for. Will they in this case attempt to say, that the governor was ignorant of the extent of those provisions of the constitution, which had vested the powers that had been formerly exercised by the executive authority, in the governor? Will it be said by them, that the governor in this case, was unadvisedly calling on the legislature to provide by law for the exercise of powers, that had been previously provided for by the constitution? Charges of this kind may be made, but among persons free from bias, and being acquainted (as most Pennsylvanians are) with the

accuracy of his discernment—the soundness of his judgment—the independence of his sentiment, and the extent of his political information, they will fall lifeless to the ground as fast as they can be uttered.

The character of governor Mifflin stands too high to be tarnished by an allegation that in the year 1790, he was unacquainted with his duties as governor of the commonwealth—that he was ignorant of the powers which had been vested in the executive by the constitution, which instrument he had so shortly before, not only assisted in the formation of, but also, was president of the convention, who had conceived, moulded and given to it their final finish.

A committee was immediately appointed, to arrange the subject matter of the governor's message, from which the above quotations have been taken, and on the 30th day of the same month made report. In detailing the subject matter of the address that required the immediate attention of the legislature, the report says, "That part of the address which enumerates the powers formerly vested in the president and supreme executive council, and which now cease to be operative, your committee conceive ought to be referred to a committee to bring in a bill for the purpose of transferring those powers generally to the governor, until the end of the present session, in order to answer the immediately pressing exigencies until the legislature shall have leisure to enumerate and define the executive powers with more precision." A committee for this purpose was accordingly appointed, a bill reported, and became a law, by receiving the signature of the governor on the fourteenth day of January following, which law is in the words following viz.

"An act for transferring certain powers exercised by the late president and supreme executive council, to the governor of this commonwealth.

Sect. 1. Whereas by the present constitution of this commonwealth, the executive powers of government are vested in the governor, and it is proper and necessary, that such laws as directed any dutties to be performed by the former executive authority of this state, should be made conformable to the new organization of the powers of government.

Therefore,

Sect. 2. Be it enacted by the Senate and House of Representatives, of the Commonwealth of Pennsylvania, in General Assembly met, and it hereby enacted by the authority of the same,

That all and every duty, which by any of the laws of this state, was directed to be done and performed by the president, or by the president and supreme executive council, not inconsistent with the constitution of this commonwealth, and not otherwise directed by the act passed in the present session, entitled "An act for instituting a board of property, and for other purposes therein mentioned" shall be executed by the governor of this commonwealth, and that every of the laws relative to the duties first herein before mentioned, shall be, and they are hereby so far forth, and no further repealed and made void, *Provided nevertheless*, That this act shall continue in force until the end of the present session of the General Assembly, and no longer."

So tenacious was that legislature of the rights of the people, so well did they know that the constitution had not vested the powers which had been formerly exercised by the executive authority in the governor, and so well were they convinced of the propriety of vesting them elsewhere, as soon as the legislature should "have leisure to enumerate and define the executive powers with more precision." that when legislating on this subject "to answer the immediate pressing exigencies" they only vested those powers in the governor to the end of that session. But it appears that the legislature did not, at that session obtain "leisure to enumerate and define the executive powers," therefore, on the thirteenth day of April 1791, (in the same session) a law was passed similar in substance, and varying but little in form, by which act, the powers that had been formerly vested in the supreme executive council, were vested in the governor, "until the end of the next session of the general assembly, and no longer." This temporary law was continued in force by temporary extensions until the 22nd day of April 1794, at which time it was re-enacted without limit or duration of time, as almost every other law is.

The above facts show most clearly and conclusively, that the general assembly in each of the sessions referred to, were fully confident, that the powers which had *not* been expressly vested in the governor, by the constitution; still remained with the people to be disposed of, and regulated by law, in such manner as prudence and experience should dictate. Any other conclusion would be a direct charge of the grossest ignorance of the provisions of the constitution. In the legislature of 1790–91, and those who annually succeed them up to the session of 1793–94 inclusive; as well as in the governor, who had in his message called the attention of the legislature to the necessity of providing by law, for the exercise of the powers which had formerly been vested in the executive authority, and which had not been provided for by the constitution.

A charge of this kind, your committee are not prepared to make, nor do they believe (when it is recollected, that beside the fourteen members who had assisted in framing the constitution, there were many others, of eminent talents and well versed in political and legal knowledge,) that any informed person will have the hardihood to charge those different assemblies with being ignorant of the constitution, and of doing a work year after year, of supererogation.

William Bingham, was Speaker of the House of Representatives at the passage of the first law, and Richard Peters, Speaker of the Senate. Richard Peters' natural talents, his literary acquirements and his legal knowledge, has procured for him the confidence of the Union, and the situation of a Judge of the United States Court, fort the eastern district of Pennsylvania: in the discharge of which duties, he has reflected much honor on himself, and great credit on the bench. Many others who served in these sessions, have richly merited the highest encomiums; but your committee forbear to say any thing further on this point.

The opinions *of Jarerd Ingersoll, Alexander J. Dallas and Thomas Elder, Esqrs. on the subject of appointments to, and removal from office, remain to be examined. The two former gentlemen have argued the case at some length, and although they do not positively say, that the exercise of all power not specially provided for by the constitution, is by the nature of our system of state government constructively vested in the executive; yet from the manner in which they have discussed the subject, it would appear that such were their views of the constitution.—This view of the subject would be indisputably correct, *provided*, the natural original power of appointing all officers was inherent in the governor; for this plain reason, that wherever right or power is naturally inherently vested, it must and does naturally remain, until it has been voluntarily divested by him or them in whom it was originally and naturally vested.

The basis of all republicanism is, that all power is inherent in the people, and consequently remains in them, until they, by their free and voluntary act do delegate their power to some person or persons to be exercised for their use and benefit. That the people have delegated their power, must be clearly and unequivocally shown by those who claim the possession of them, before they can be justified in the exercise thereof, by the friends of freedom.—Again, these two gentlemen lay it down as a political maxim, that the power to remove, is a necessary incident to the power to appoint In this opinion also, your committee beg leave to differ from the learned gentlemen, as well as from all others who attempt to support this doctrine. From what has already been

* *See Nos. 1, 2 and 3, attached to this report.*

said, it will be seen, that whatever powers of appointing to office, the governor may be vested with, have been delegated to him by the people, or by their immediate agents, to be exercised, not for his, but for their benefit: to discharge the duties of this delegation is not a matter of personal choice, but a matter of official duty, therefore ministerial. But to remove at pleasure, is the height of despotic tyranny—the two principles are as opposite as the poles, and can no more be incorporated into the same political principles, than the most bitter abject tyranny, can with the purest and most rational unrestrained political freedom.

The constitution provides *only* two methods of removing civil officers—one by impeachment, the other, by address—the former of which depends entirely on the general assembly, and the latter so far as to form, agree to, and present the address to the governor, who may, or may not comply with the request therein contained. But, it is not any where in the constitution, recognized that the governor, may remove any officer at pleasure. The latter gentleman, "assured the committee, that he knows of no appointment to, or removal from office by any governor of Pennsylvania, since the adoption of the present constitution, which, in his opinion, was not constitutional." Your committee, however, cannot resist the idea, that this learned gentleman has in the formation of his opinion, adopted what they believe to be a very common course, viz. he has yielded his judgment in this case to the common prevailing opinion, without having strictly examined all the facts necessary, to a full understanding of the subject.

Your committee, in this place, would merely observe, that the legislature so far from leisurely enumerating and defining the executive powers with more precision, (as was proposed by the first report made on this subject) have been extending the powers that were vested by the constitution, in such manner, that the executive department does at this time exercise a patronage to an extent, unknown in any other state of the union; and (as your committee verily believe they have clearly shown) inconsistent with the fundamental principles of our state government. Your committee will not attempt, nor is it necessary to draw a fanciful figure, or give an exaggerated view of the extent of executive patronage; but they hope that they may be permitted to state, what is the undeniable fact, viz. that the officers in the appointment of the governor, who are removeable at his pleasure, (agreeably to the construction given to the constitution, by the advocates of executive patronage,) are in the annual receipt of thousand dollars.

What would the people say—What would the legislature think—were the friends of executive patronage, to propose to give the governor the annual sum of thousand dollars to

secure his popularity with ? Would they not all revolt at the idea ? Would it not be said with much propriety, that an artful intriguing governor, with that sum at command, for this purpose, might commit many acts of tyranny and oppression, and still have it in his power to stifle investigation, and continue his popularity, while he continues his office by the liberal distributions of presents ? Such suspicions would doubtless be abroad among the people, were it attempted to appropriate. Yet that sum, in money distributed for that purpose by donations, in the most advantageous manner, could not so effectually shield a person's character, or secure his popularity, as a politic distribution of the numerous offices in the gift of the governor, would do ; because, every person who would receive a fee from the governor, to spread abroad and exaggerate his virtues, to conceal, deny and extenuate his vices, would be viewed, not only with suspicion, by the public, but with real contempt by all who knew the fact. The case is very different with officers who are appointed by the governor ; instead of detracting from, it adds to their respectability ; instead of lessening their influence, it gives it a more extensive range ; instead of preventing them from, it enables them more effectually to support the character of the governor, to whom many of them are as completely devoted, as they possibly could be, were they paid by the year for their services.

Your committee have spoken plainly and freely on this subject, *because*, under all the circumstances of the case, freedom and plainness appeared to them necessary—but they do not wish to be understood as attaching blame to any particular person. The gigantic growth of executive patronage, can be easily and rationally accounted for without individual condemnation ; it is in some degree owing to the principles of our government, as well as to human nature generally. The governor is elected for three years, and may when elected, look around him with the purest intentions, to see what powers he has been vested with, that can be called into operation for the benefit of the people, and the advancement of his own character, a matter never lost sight of, nor should it ever be ; but we often mistake the means that will lead us to the end. He meditates, reflects and fancies public advantages, and enquires whether he has within his power the means to promote them. If he has any doubts in his own mind of his powers, to provide a salutary remedy in the case ; he takes the counsel of learned and influential friends, by whom from the nature of his situation, he is generally surrounded.

Those friends may very probably have a greater personal interest in an extensive executive patronage, than the governor himself has ; consequently the greatest possible range of construction is given to his powers. If this was only to happen once, during the

continuance of the constitution, the danger to be apprehended would not be so great ; but every new case produces a new cause for construction ; and every new governor has a new set of advisers. In this way, executive patronage has been swelled and extended to the enormous size in which it now exists. Very different is the case with the legislature, many of whose members are elected to effect some particular local objects, which employ their whole attention, during the session, at the end of which, they return to their constituents perfectly satisfied with having effected the purposes for which they were elected.

The next legislature is composed of members who were elected with similar views—so one session passes after another—and although composed partly of different materials, the labors are very near the same, viz. each member is most anxious to promote the views and interest of his own immediate constituents ; and in the bustle of local business, each succeeding session passes off with but little attention to matters that might possibly at some remote period, effect the political relations of the state at large. This view of the subject presents a case, fit for the application of the old adage, " that, what is every body's business, is nobody's business," meaning that matters of general interest are apt to be neglected ; because no one individual feels sufficient personal interest to invite his particular attention to the case, and each one satisfies himself with the idea that other persons are as deeply interested in the matter as he is, and consequently as much bound in duty to attend to it, as he is ; and as for himself, he must and will (for the present at all events) apply his time and talents, to effect some particular matters in which his particular constituents and himself has a deep and lasting interest ; to effect which, was perhaps, the principal inducement to elect him to the legislature. Owing to these causes, questions that are general in their nature, though of great importance, are almost inevitably overlooked.

To condemn this practice, would be declaring war against ourselves—against all the human family—it is in our nature to attend first to our own particular necessities and advancements. But the case before us, nevertheless shows the necessity of a vigilant watchfulness on the part of the people, over their own concerns, which, if neglected too long, may bring much difficulty upon them.

That the people who are always jealous of their rights, have so long permitted executive encroachments, is quite as easily accounted for.

The science of government, though the noblest invention of man, is no where taught in our country : nor any science connected therewith ; that of the law only excepted. And this honorable profes-

sion is but a deduction from governmental science ; the votaries whereof may enjoy all the honors and advantages of the profession, without paying the least attention to any of the branches of government, other than the administration of the law : nor does the professional duties of this class of gentlemen, require them to become the vedettes of the people's rights, or call upon them to volunteer their services as the sentinels and safe-guard against executive encroachments. Nor is it to be expected that the citizens, whether professional or otherwise, will enter into, and produce a correct and general analysis of the constitution, pointing out the particular powers that properly belong to, and the particular duties to be performed by the different departments of the government, and the several officers of the state.

After bringing into view the difficulties that questions of this kind seem to be involved in, it would be natural to ask, where a redress for such grievances, is to be had ?—Notwithstanding the difficulties and embarrassments, that such a question must under common circumstances be surrounded by on account of the urgency of local concerns, and other matters more generally understood, which the citizens press upon the legislature ; the answer must be in the legislature ; in them the constitution has vested the power to pass laws for the general good, and they must, when necessity requires, exercise their constitutional powers in general cases, although every local matter should be thereby neglected for a time.

Your committee are aware, that they have all the prejudice of custom to oppose, and the interest of the executive adherents, and those who hold offices under him, to convince all of whom the limit bounds of a report of this kind is entirely insufficient ; their only hope is to convince the unbiassed, that the positions they have taken, and the conclusions which they have drawn, are in accordance with common sense, and with the true principles of our constitution. They therefore, offer the following resolution :

THAT it is constitutional and expedient to provide by law for the election or appointment of an attorney general, and the necessary number of deputies to prosecute in behalf of the commonwealth, in the several counties, an auditor general, a secretary of the land office, a surveyor general, and the number of deputies necessary, to do the surveying in the several counties, prothonotaries, registers and recorders, clerks of the courts of general quarter sessions of the peace, of oyer and terminer and general jail delivery and orphans court, prescribing in such law the length of time each officer shall hold his office, provided he shall so long behave himself well.

DOCUMENTS

REFERRED TO IN THE PRECEDING REPORT.

A

Office of the Commonwealth,
Harrisburg, Feb. 19, 1821.

REES HILL, Esq.

SIR,

I have now the honor of enclosing herein such information, as is in my power touching the subject matter of the preamble and resolution, referred to me by the committee. I perhaps owe an apology to the committee, for the delay in making the communication, but I trust they will see a sufficient cause for it, in the frequent interruptions arising from attention to other official duties.

With very great respect, I have the honor to be
Your and the committee's most obedient servant,

ANDREW GREGG.

THE honorable Messrs. Hill, Raguet and Eichelberger, the committee to whom was referred a preamble and two resolutions, authorizing them to call on the secretary of the commonwealth and attorney general, for any information in their power, to give, touching the subject matter of said preamble, and the first resolution.

THE undersigned in endeavoring to comply with the terms of the propositions contained in the preamble and resolution, submitted to him by the committee, would remark, in general, that he presumes there can be no diversity of sentiment among the peo-

ple of this country, respecting the importance of all being made acquainted with the principles of the government, and with the public acts of all who have any agency in its administration That the great power with which the governor is invested by the constitution, renders it peculiarly necessary, that his public conduct should be watched with vigilance, is a subject in which it is also believed, there is a general, perhaps a universal concurrence of sentiment. To preserve the permanency and purity of their government, the attention of the people should always be on the alert, to guard against any unconstitutional usurpations in any of its departments.

By the eighth section of the second article of the constitution, the governor is invested with power to appoint all officers, whose offices are established by the constitution, or that shall be established by law, and whose appointments are not therein otherwise provided for. Under this general power, the governor has, ever since the commencement of the government under the present constitution, been in the regular habit of appointing all officers, whether immediately designated by it, or whose offices were made by law conformably to its provisions. It is not known in this department nor have any records been discovered to show, that any governor has exceeded his constitutional limits in the exercise of this power.

It may not be considered irrelevant in this enquiry, to refer to the constitution of this state which was adopted on the 28th day of September 1776, and the practice of the government under it. By the ninth section of that constitution, it is declared, that the general assembly shall have power to choose their speaker and other officers, and the treasurer of the state. By the twentieth section, the supreme executive council was vested with power to appoint and commissionate judges, naval officers, judge of admiralty, attorney general, and all other officers, civil and military, except such as are chosen by the general assembly and the people, agreeably to that frame of government, and the laws that might be made thereafter ; and also supply any vacancies that might be occasioned by death, resignation, removal or disqualification.

It appears that the assembly prior to the meeting of the council of censors, in 1783 had created some offices, and appointed the officers to execute them, in the same acts by which the offices were created. This was censured by the council of censors as an unwarrantable encroachment on the constitutional rights and powers of the executive ; and an act was passed on the 4th of April 1785, in conformity with the decision of the council of censors. The second section of this act designates particularly the officers to be appointed by the assembly, and declares the appointment of all

other officers necessary for the execution of the laws, to be vested in the supreme executive council, with the exception of such as were specially reserved to the people, or plainly directed by the constitution to be otherwise chosen or appointed. There is no evidence of any subsequent interference with the executive council in the exercise of its power of appointment, during the continuance of the government under that constitution.

On the organization of the government under the present constitution, an act was passed on the 14th of January, 1791, directing that all and every duty which by any of the laws was directed to be done and performed by the president and supreme executive council, not inconsistent with the constitution, nor otherwise directed by an act for instituting a board of property, should be executed by the governor. By an act passed on the 13th of April, 1791, it was enacted, that in addition to the powers vested in the governor, by the constitution, he should have and exercise all the power that by any law or laws was vested in the supreme executive council, or in the president or vice-president thereof, unless the same should be vested in some other person, or be inconsistent with the provisions of the constitution. This power was continued by various subsequent acts passed, on the 21st of September, 1791—on the 28th of March, 1792—on the 11th of April, 1793—and on the 22d of April, 1794. Any further progress of these acts has not been pursued, it seeming to be understood that by these various enactments, the exercise of that power had acquired the force of common law, no question having ever been made, as far as it is known here, of its incompatibility with the constitution or the laws made under it.

A reference to these acts is made to show that if any appointments not specially designated in the constitution, nor by law, but rendered necessary by the circumstances of the case or the common consent of the people, were made by the supreme executive council, such power now is legally vested in the governor. It is not however intended by this to insinuate, that there are any such offices, or that any such appointments have been made. It is acknowledged that no special act has been found establishing the various offices of courts of justice, with the exception of judges, and those that are elected by the people, but they are all recognized in the third section of the sixth article of the constitution, and in all the various acts of assembly, establishing courts. When the constitution says, that prothonotaries, clerks of the peace, &c. shall keep their offices at a particular place, it is a constitutional acknowledgement or declaration that such offices do exist, and that there must be officers to fill them. The power of appointing these officers, is of course vested in the governor, under his general power

of appointment, agreeably to the eighth section of the second article of the constitution before quoted.

The second act passed by the assembly, under the constitution of 1776, was to revive and establish courts of justice ; and among the first acts of the executive council, was the appointment of prothonotaries, clerks of sessions, of orphans courts, registers, &c. The power of making these appointments, was vested in, and exercised by the supreme executive council, until the change of government took place, and that power having been transferred to the governor by various acts of assembly as herein before recited, may be considered as legally vested, even had it not been so expressly given him by the constitution.

This description of officers, with all others, the manner of whose removal from office is not pointed out in the constitution, have been considered removeable at the will of the governor, and the tenure of their appointments has invariably been so expressed in their commissions, that they were to hold till their commissions were revoked by the governor, or by other lawful authority, superseded or annulled. The power of removal from office appears incident to the power of appointment, and was exercised by the supreme executive council, under the constitution of 1776, and by each succeeding governor of the state under the present constitution.

It is presumed, the committee will not require the enumeration of a multiplicity of cases to evidence the general exercise of the right of judging, and power of removing. A reference might be made to many instances, in which it has been applied to officers in the various departments of government. A few will be selected to show that such has been the practice.

The person who held the offices of prothonotary, clerk of the sessions, and oyer and terminer, in Huntingdon county was removed by a resolution of the supreme executive council, and by a subsequent resolution, the same person was removed from the office of clerk of the orphans court. The receiver general of land office was removed by the first governor of the state, and this was such a noted instance, and excited so much interest, that it is still fresh in the recollection of those who were conversant in the affairs of the state at that time. Early in the administration of the second governor, the inspector of flour in Philadelphia was removed. This, it is believed, is the first case in which the power of removal was disputed. The question was referred to Messrs. Ingersoll and Dallas, and a statement of the case with their opinion, is hereto annexed. Removals since that period have been more frequent. A surveyor general has been removed, a recorder of deeds has experienced the same

fate, and the list might be swelled with the cases of auctioneers, inspectors, prothonotaries, &c. &c. There is no evidence in this office, to show, that any legal opposition has been made to any of these removals, but it may not be improper to mention a report, to which common fame has given currency, that a question recently arose on the removal of the inspector of salted provisions, in Philadelphia, and was decided by the supreme court, that the power as exercised, was constitutionally vested in the governor.

The undersigned has not been able to discover any alteration, that, in his opinion might be constitutionally made in appointments to, and continuance in office, of any of the offices now in the gift of the governor. His power is general, with the exception of the cases mentioned in the constitution. Whether he is the best depository for that power, is a very different question, and one on which he should feel great delicacy in giving an opinion. The different modes, adopted by the different states, of the trust and exercise of that power, furnish a very striking evidence of the difficulty of settling the question. It is certainly a very important trust to be committed to one man, and yet we find complaints of abuse, have perhaps, been heard in every government that has had recourse to plural executives, as a security against the evil.— It is yet in the recollection of many that dissatisfaction with the executive council of the constitution of 1776, produced that under which we now live, and so strong did the current then run in favor of a single executive and individual responsibility, that no arguments could prevail in favor of a division of the power, or securing against its improper exercise, by subjecting his appointments to some concurring department of government Universal experience proves the importance of a watchful eye being kept on this power wherever it is placed. The vigilance and virtue of the people, are the best security against its abuse.

Having given this general view of the subjects embraced in the preamble and resolution, such a detailed statement is now presented of offices and appointments, as appears more especially to have been intended by the resolution. It was thought it might be desirable to the committee to have all the offices with their different tenures before them in a single view.

Appointments by the governor, and for what period of service, with reference to the authority under which they are made, that is to say.

Secretary of the Commonwealth, during the governor's continuance in office—See 15th Section of the 2nd Article of the constitution.

Judges of the Supreme Court, during good behavior.

President Judges of the courts of common pleas in the several judicial districts of the commonwealth, during good behavior.

Associate Judges of the courts of common pleas in the several counties of the state, during good behavior.

Additional Judges of the district court of the city and county of Philadelphia, see acts of assembly of the 3d of March 1811, and the 13th of March 1817, for the term of four years.

Associate Judges of the same court, by the same act, for the same period.

Additional Judges of the district court of the city and county of Lancaster, see act of assembly of the 27th of March 1820, for four years.

Attorney General, during pleasure.

Clerks of the supreme courts in several districts, during pleasure.

Prothonotaries of the courts of common pleas, and Clerk of the orphans' courts, general quarter sessions of the peace, and of oyer and terminer and jail delivery, holden by the judges of the court of common pleas, during pleasure.

Clerks of the mayors courts in the cities of Philadelphia, Lancaster and Pittsburg, during pleasure.

Recorders of the said several cities, during good behavior.

Aldermen of the said cities, during good behavior.

Justices of the Peace in the several counties, during good behavior.

Sheriffs and Coroners in the several counties, for three years.

Recorders of deeds in the several counties, during pleasure.

Notaries Public, during good behavior, see act of assembly of March 5th 1791.

Interpreters of Foreign Languages, during pleasure

Secretary of the Land Office and *Surveyor General*, for three years, removeable from office by the governor on the address of both houses of the legislature, see act of the 29th of March, 1809, volume 5 Smith, page 48.

Auditor General of Accounts for a like period, and removable in like manner, see act of the 30th of March 1811, 5th volume, page 237.

Auctioneers, the president and council to appoint three during pleasure, volume 1, page 509, 23d September 1780.

The appointment of a fourth Auctioneer, authorised by act of assembly of the nineteenth of March, see 2nd volume, page 481, during pleasure.

The appointment of two additional Auctioneers authorised by act of assembly of the twenty-seventh of March 1790, same volume, page 520, during pleasure.

The appointment of an auctioneer for the sale of horses, cattle and carriages, within the city of Philadelphia, authorised by an act of assembly of the tenth day of April 1799, volume 3, page 379, during pleasure

The appointment of an auctioneer for the sale of books, stationary, paintings and prints, within the city and liberties of Philadelphia, see act of assembly of the 25th January 1816, during pleasure.

The appointment of two auctioneers, in and for the city of Pittsburg, authorised by acts of assembly of the 28th of March 1814, page 307, and the 22d March 1820, page 90, during pleasure.

Inspector of beef and pork, shad and herring, by the governor, during pleasure, see volume 1, page 170, volume 2, pages 476, 498, volume 3, page 258, volume 1, page 418, volume 5th, page 121.

Of staves and heading, boards, plank, timber and shingles, volume 1, pages 222, 277, volume 2, page 528, volume 3, pages 258, 268, 314, volume 5, page 147, volume 2, page 505, during pleasure.

Of flour in and for the city and county of Philadelphia, volume 1, pages 528 and during pleasure

Of flour for the Western counties, volume 3, page 52, during pleasure.

Of butter and hogs lard, volume 4, pages 104 and 404, during pleasure.

Inspector of ground black oak bark, volume 4, page 194, during pleasure.

of gunpowder, volume 3, pages 240, 498, during pleasure.

of salted fish in the towns of Columbia and Pittsburg, see act of the 25th February, 1818, during pleasure.

Measurer of corn and salt, lime and coal, 2d volume, pages 350, 441, and 442, during pleasure.

Superintendent of the gunpowder magazine, 2d volume, pages 402 403, and 404, during pleasure.

Register of German passengers, volume 2, page 329, during pleasure.

Guagers and *Inspectors* of domectic distilled spirits; two to be appointed during, pleasure, act of 14th March, 1814, page 100.

Keeper of Weights and Measures and Sealer of dry measures, different officers, during pleasure, to reside in the city and county of Philadelphia, volume 1, pages 18, 19, 44.

Port Physician, Lazarette Physician, Health Officer and *Quarantine Master*, may be removed from office by the Governor at the request of the members of the board of health, or a majority of them, volume 4, page 304.

Master and Assistant Wardens of the port of Philadelphia, for one year.

Very respectfully,
I have the honor to be,
Gentlemen,
Your obedient servant,
ANDREW GREGG.

February 19th, 1821.

(1)

[CASE.]

Thomas Mifflin, Governor of the Commonwealth of Pennsylvania, executed a commission under the state seal, dated January 14th, 1799, to James Reed, as Inspector of bread and flour for the city and county of Philadelphia, to hold said office for the term of *four* years, if he should so long behave himself well. The period of Governor Mifflin's administration terminated on the 16th day of December, 1799, by effluxion of time, and Thomas M'Kean was the next day proclaimed Governor.

Question. Does the above commission continue in force for the term of four years, or did it determine with the power of the Governor? See first volume Pennsylvania Laws, 889, section 19.

I am clearly of opinion that the commission of Mr. Read may be superseded at the pleasure of the present Governor. The Legislature might create the office, the constitution ascertains the terms of the commission. Governor Mifflin could not give the appointment, except in the manner prescribed in the constitution, and this officer is not one of the enumerated instances which are to be during good behavior, for a term of years, or appointed by the legislature, and of course falls under the only remaining class revocable at the pleasure of the Executive.

JARED INGERSOLL.

March 1st, 1800.

(2)

LANCASTER, *March 1st*, 1800.

The case naturally presents two principal objects for inquiry. 1st, Whether the Legislature has power to prescribe the duration of commissions issued to the public officers? 2d, Whether it is in the power of the Governor, for the time being, to grant a commission for any term of years, so as to be binding on his successor?

1st. The constitution vests in the Governor the exclusive power of appointing, and it follows as an incident, of removing all public officers whose commissions are not otherwise provided for by the constitution itself. There are, indeed, but three tenures of office

recognized by the constitution; 1st, Judicial offices, which are to be held during good behavior; 2d, civil offices which are to be held at the pleasure of the Governor, and 3d, fiscal offices, which are constitutionally limited in point of time, with the exceptions of the secretaries, sheriffs and coroners, and other enumerated offices which are to be held under the appointment of the legislature, or in such other manner as is, or shall be, directed by law. It is clear, therefore, that the legislature cannot appoint to any offices which are not expressly designated, as exceptions to the general authority of the governor, and I think it necessarily follows that they cannot, in any other cases, interfere with his general authority of removal. The executive power of removal, and even the power of appointing, would become, in a great measure, nugatory, if the duration of the appointment after it was made depended on legislative regulations; for if the legislature can declare that a man shall continue in office for four years, the declaration may, with the same reason, be protracted for forty years, nay, speaking indefinitely, it might vest every office for the life of the officer, or during his good behavior, and thus the power, control, and responsibility, intended for the executive magistrate, would be essentially transferred to another department of the government. Under this impression, it appears to me that, though the legislature may establish temporary offices, or abolish any office not depending on the constitution, yet they have not a power to prescribe the duration of any commission regularly issued for any permanent civil office by the governor.

But it may be proper to add, that the law in question was, in other views, unconstitutional. For instance, in assuming the power to nominate and appoint the officer, as well as to prescribe the duration of his commission,* and even in the view now contemplated, it only respects the actual occupant, and does not extend to his successors. In the case of a vacancy, indeed, it was to be supplied by justices of the peace "until the Assembly shall appoint another inspector." Thus, excluding in one word, at least, the idea of any tenure for years, though the assembly might not re-appoint, and the truth is, that since the first appointment by the law the legislature have never attempted to exercise the power of appointment, but it devolved (without any legislative cession) upon the supreme executive council, to whom, in the opinion of the council of censors, it constitutionally belonged.

If the regulation was unconstitutional under the old frame government, the same reasons render it inconsistent with the provisions of the existing system, and it is, of course, repealed or annulled.

2d. On the second object of inquiry, I premise that, if the law is repealed or annulled, by force of the existing constitution, the late governor could derive no power from it; and if the legislature

*See a declaration act on this point, passed the 4th April 1785.

could not prescribe a duration to the commission, I think they are equally incompetent to authorize the governor to do so. The power of the executive depends implicitly, and entirely, on the grant of the constitution. The legislature and the governor cannot, therefore, jointly, or separately, make the power an iota more or less than the constitution has made it, nor direct or modify the exercise of it, in a manner different from the obvious design and meaning of the grant. The power of appointing to office, and of removing from office, is granted to the Governor for the time being, upon principles of public policy and personal responsibility, but if it is construed so as to authorize the governor's issuing a commission for a term of years, all public policy and personal responsibility are at an end. No greater latitude of construction will be necessary to authorize the executive magistrate to confer commissions for life, or in tail; and every Governor, at the close of a triennial administration, must have it in his power to impose his own partizans upon a rival successor, who may know nothing of the merits, and ought not to be made answerable for the conduct of officers thus appointed without his previous participation, or subsequent assent.

Hence, I conclude, that the governor for the time being has not the power to grant a commission for any term of years, so as to be binding on his successor.

And the general result, upon the case stated, is, that the commission of Mr. Reed, may be superseded at the pleasure of the present governor.

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(3)

Office of the Commonwealth,
February 21st, 1821.

REES HILL, Esq,

Sir,

In examining the law respecting escheats, passed on the 29th of September, 1787, I find the supreme executive council, were authorized and directed to appoint an officer to be called *Escheator General*, to hold his office for seven years, if he should so long behave himself well. And this office has been filled by successive appointments since that time. The present incumbent was appointed on the 14th September, 1815.—I have thought it necessary to mention this, to render more perfect the list already furnished.

Very respectfully,
I am yours,
ANDREW GREGG.

(4)

GENTLEMEN,

I take the honor of acknowledging the receipt of Col. Hill's letter, covering the preamble and resolutions therein referred to, and have taken time to collect on the subject such information, as was within the reach of my limited means. Having done so, I now respectfully assure the committee, that I know of no appointment to, or removal from office, by any governor of Pennsylvania, since the adoption of the present constitution, which in my opinion, was not constitutional.

I am, Gentlemen,
Your respectful and
Obedient servant,

THO. ELDER.

To Rees Hill, Condy Raguet and Frederick Eichelberger, Esquires, Committee of Senate, &c.

Harrisburg, Feb. 26th, 1821.